# Jasmira bin Othman v Tan Sri Hj Abdul Hadi bin Awang

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 02(f)-38–07 OF 2023 (T)
ABANG ISKANDAR PCA, ZABARIAH YUSOF AND RHODZARIAH BUJANG FCJJ
13 NOVEMBER 2024

*Elections — Petition — Petition to nullify election of candidate — Petitioner alleged winner of parliamentary seat had bribed voters to vote for him — Whether petition had to be dismissed as petitioner failed to prove bribery allegation beyond reasonable doubt*

The appellant and the respondent were among four candidates who contested for the Marang parliamentary seat in Terengganu in the 15th General Election held on 19 November 2022. The respondent won the seat, polling 73,115 votes. The appellant, his closest rival, obtained only 31,386 votes. The appellant filed a petition in the High Court to nullify the respondent's election contending that he had won by bribing voters. The appellant alleged that there were two incidents of bribery — that the first incident took place on polling day itself at a mosque ('the *surau* incident') whilst the second took place at various community centres between the 14 and 18 November 2022 ('the i-Belia and i-Siswa programme'). In the *surau* incident, the appellant contended that the respondent's alleged agent ('Norddin') gave away RM50 to each registered voter in return for their verbal promise to vote for the respondent. The appellant had specifically mentioned in the petition, the names of two persons who had received the money ('the identified recipients'). In the i-Belia and i-Siswa programme, the appellant alleged that three Terengganu state executive councilors, PW8, PW9 and PW10, allegedly acting as agents for the respondent, had given one-off payments of RM150 to selected recipients. The High Court dismissed the election petition on the grounds that: (a) the appellant's failure to call the identified recipients in the *surau* incident to testify was fatal as this prejudiced the respondent's right to specifically counter that allegation; (b) the appellant's calling of five other alleged recipients ('PW2 to PW6') to state that they had received monies from Norddin could not be accepted in law as such was never pleaded; (c) a video recording of PW2 to PW6 receiving the alleged bribe-money from Norddin was inadmissible in evidence as the person who recorded the video was not called as a witness, nor was a certificate under s 90A of the Evidence Act 1950 ('the EA') produced to verify that the video recorder was in good condition; and (d) the failure to call Norddin to testify meant that the allegation that he was the respondent's agent was not proven. The failure also attracted the invocation of adverse inference against the appellant under s 114(g) of the EA. With regard

to the i-Belia and i-Siswa programme, the High Court held, inter alia, that: (i) the programme was a State Government-approved project and the state executive councilors who distributed the cash aid to selected recipients were merely carrying out their official duties and not as agents for the respondent; and (ii) none of the persons who received the cash aid was called to testify; hence, there was no proof that they voted for the respondent in return for receiving the aid. The instant appeal was against the High Court's decision.

**Held**, unanimously dismissing the appeal:

(1) Given the serious punishment prescribed under the Election Offences Act 1954 for those found guilty of committing corrupt practices, an election petition was quasi-criminal in nature and the standard of proof of allegations of corrupt practice stated in the petition was of 'beyond reasonable doubt' (see para 3).

(2) The appellant's non-calling of the identified recipients in the *surau* incident was rightly held by the election judge to be detrimental as it departed from his pleaded case. That failure could not be rectified or mitigated by the calling of PW2-PW6 to testify that they had received 'bribes' from Norddin as that was not the appellant's pleaded case. Further, the names of recipients were material facts which had to be pleaded under reg 4(1)(6) of the Regulation to enable the respondent to effectively prepare his defence to the petition. The respondent was entitled to know with clarity and certainty at the earliest stage, the names and identities of persons to whom alleged bribes were given (see para 5).

(3) The video of Norddin directing a few persons to swear that they would vote for the respondent before giving them money — and which video was marked for identification as ID14 — was rightly excluded from evidence as the maker of the video was never called to testify and there was non-compliance with the proviso to s 73A of the EA (see paras 6–7).

(4) Just because Norddin was a committee member of the PAS Marang branch at the material time did not ipso facto make him the respondent's agent. The net of agency could not be cast too wide to include even ordinary party supporters for there had to be a nexus or connection between the alleged agent and the respondent as the candidate. In other words, there was no presumption of implied agency in election law even though the alleged agent and the respondent were from the same political party (see para 8).

(5) The monetary aids given out in the i-Belia and i-Siswa programme was a project approved by the Terengganu State Legislature one year before the 15th General Election was held and, on the face of it, was not pre-planned to induce voters to vote for the respondent. The election judge found that the aids were given away by PW8, PW9 and PW10 in

their official capacities as representatives of the state government and not as agents of the respondent. Given that background, it could not be said to have been proven beyond reasonable doubt that those aids were meant to bribe the recipient voters (see paras 10–11).

**[Bahasa Malaysia summary**

Perayu dan responden adalah antara empat calon yang bertanding di kerusi Parlimen Marang di Terengganu pada Pilihan Raya Umum ke-15 yang diadakan pada 19 November 2022. Responden telah memenangi kerusi itu dengan undian sebanyak 73,115 undi. Perayu yang merupakan saingan terdekatnya hanya memperoleh 31,386 undi. Perayu memfailkan petisyen di Mahkamah Tinggi untuk membatalkan pilihan raya responden dengan alasan bahawa dia telah menang dengan merasuah pengundi. Perayu mendakwa bahawa terdapat dua insiden rasuah — insiden pertama berlaku pada hari pengundian itu sendiri di sebuah masjid ('insiden surau') manakala yang kedua berlaku di pelbagai pusat komuniti antara 14 dan 18 November 2022 ('program i-Belia dan i-Siswa'). Dalam insiden surau, perayu berhujah bahawa ejen responden ('Norddin') telah memberikan RM50 kepada setiap pengundi berdaftar sebagai balasan atas janji lisan mereka untuk mengundi responden. Perayu telah menyebut secara khusus dalam petisyen itu, nama dua orang yang telah menerima wang itu ('penerima yang dikenal pasti'). Dalam program i-Belia dan i-Siswa, perayu mendakwa tiga Exco Kerajaan Negeri Terengganu iaitu PW8, PW9 dan PW10 yang didakwa bertindak sebagai ejen responden telah memberikan bayaran sekaligus sebanyak RM150 kepada penerima terpilih. Mahkamah Tinggi menolak petisyen pilihan raya atas alasan bahawa: (a) kegagalan perayu untuk memanggil penerima yang dikenal pasti dalam insiden surau untuk memberi keterangan adalah memudaratkan kes kerana ini menjejaskan hak responden untuk secara khusus untuk membantah tuduhan tersebut; (b) tindakan perayu memanggil lima penerima lain ('PW2 kepada PW6') untuk menyatakan bahawa mereka telah menerima wang daripada Norddin tidak boleh diterima menurut undang-undang kerana perkara ini tidak pernah diplidkan; (c) rakaman video PW2 hingga PW6 yang menerima wang rasuah yang didakwa daripada Norddin tidak boleh diterima sebagai keterangan kerana orang yang merakam video itu tidak dipanggil sebagai saksi dan tiada sijil di bawah s 90A Akta Keterangan 1950 ('AK') yang dikemukakan untuk mengesahkan bahawa perakam video tersebut berada dalam keadaan baik; and (d) kegagalan untuk memanggil Norddin untuk memberi keterangan bermakna dakwaan bahawa dia adalah ejen responden tidak dibuktikan. Kegagalan itu juga membuatkan anggapan berbalik dikenakan terhadap perayu menurut s 114(g) AK. Berkenaan program i-Belia dan i-Siswa, Mahkamah Tinggi berpendapat, antara lain, bahawa: (i) program itu adalah projek yang diluluskan oleh Kerajaan Negeri dan ahli majlis mesyuarat kerajaan negeri yang mengagihkan bantuan tunai kepada penerima terpilih hanya menjalankan tugas rasmi mereka dan bukannya sebagai ejen kepada responden; dan (ii) tiada seorang pun daripada orang yang menerima bantuan

A tunai dipanggil untuk memberi keterangan; oleh itu, tiada keterangan yang menunjukkan bahawa mereka mengundi responden sebagai balasan untuk menerima bantuan. Rayuan ini atas keputusan Mahkamah Tinggi tersebut.

**Diputuskan**, sebulat suara mengenepikan rayuan:

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(1) Memandangkan hukuman berat ditetapkan di bawah Akta Kesalahan Pilihan Raya 1954 bagi mereka yang didapati bersalah melakukan amalan rasuah, petisyen pilihan raya adalah bersifat separa-jenayah dan standard pembuktian amalan rasuah yang dinyatakan dalam petisyen adalah 'melampaui keraguan munasabah' (lihat perenggan 3).

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(2) Tindakan perayu yang tidak memanggil penerima yang dikenal pasti dalam insiden surau itu wajar diputuskan oleh hakim Pilihan Raya sebagai memudaratkan kes kerana ianya menyimpang dari kes yang diplidkan. Kegagalan itu tidak dapat diperbetulkan dengan memanggil PW2-PW6 untuk memberi keterangan bahawa mereka telah menerima 'rasuah' daripada Norddin kerana ianya bukan kes yang diplidkan oleh perayu. Selanjutnya, nama-nama penerima adalah fakta material yang perlu diplidkan menurut peraturan 4(1)(6) Peraturan tersebut untuk membolehkan responden menyediakan pembelaannya dengan berkesan terhadap petisyen itu. Responden berhak untuk mengetahui dengan jelas pada peringkat awal, nama dan identiti orang yang dikatakan menerima rasuah (lihat perenggan 5).

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(3) Video Norddin mengarahkan beberapa orang untuk bersumpah bahawa mereka akan mengundi responden sebelum memberi mereka wang — yang mana ditandakan sebagai ID14 — adalah dengan betul dikecualikan dari diterima sebahai keterangan kerana pembuat video itu tidak pernah dipanggil untuk memberi keterangan dan terdapat ketidakpatuhan terhadap peruntukan s 73A AK (lihat perenggan 6–7).

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(4) Hanya kerana Norddin adalah ahli jawatankuasa PAS cawangan Marang pada masa itu tidak secara *ipso facto* menjadikan beliau sebagai ejen responden. Penyokong parti biasa tidak boleh dikatakan sebagai ejen kerana harus ada pertalian atau hubungan antara ejen yang didakwa dan responden sebagai calon pilihan raya. Dalam erti kata lain, tiada anggapan agensi tersirat dalam undang-undang pilihan raya walaupun ejen yang dikatakan tersebut berasal dari parti politik yang sama dengan responden (lihat perenggan 8).

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(5) Bantuan kewangan yang diberikan di dalam program i-Belia dan i-Siswa adalah projek yang diluluskan oleh Badan Perundangan Negeri Terengganu setahun sebelum Pilihan Raya Umum ke-15 diadakan dan tidak dirancang terlebih dahulu untuk mempengaruhi pengundi untuk mengundi responden. Hakim Pilihan Raya mendapati bahawa bantuan itu diberikan oleh PW8, PW9 dan PW10 atas kapasiti rasmi mereka

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sebagai wakil kerajaan negeri dan bukannya sebagai ejen responden. Melihat kepada fakta ini, tidak boleh dikatakan tiada keraguan munasabah yang menunjukkan bahawa bantuan tersebut bertujuan untuk merasuah pengundi (lihat perenggan 10–11).]

**Cases referred to**

*Abdul Hakim bin Abdul Wahid v Mas Ermieyati bt Samsudin and another appeal* [2023] 4 MLJ 232; [2023] 6 CLJ 667, FC (refd)
*Ahmad Faisal bin Abdul Karim v Mohd Radzi bin Md Jidin* [2023] 9 MLJ 217; [2023] 4 CLJ 167, HC (refd)
*Audrey Karen Barry v Datuk Dr Yee Moh Chai* [2009] 3 MLJ 141; [2010] 3 CLJ 660, FC (refd)
*Borough of Wakefield* (1874) 2 O' M & H 100 (refd)
*Dato' Mohd Zubir bin Embong lwn Datuk Hj Ahmad Amzad bin Mohamed @ Hashim* [2023] MLJU 1542, HC (refd)
*DP Mishra v Kamal Narain Sharma & Ors* 1971 AIR 856, SC (refd)
*Goh Kooi Pheng v PP* [2016] 6 MLJevi 145, CA (refd)
*Isnin bin Hj Aliasnih v Lajim bin Ukin* [2014] 5 MLJ 297; [2014] 6 CLJ 950, FC (refd)
*Jikulin Nointin @ Anastasius v Gapari bin Kitingan @ Geoffrey Kitingan & Ors* [2018] MLJU 1657; [2018] 1 LNS 1858, HC (refd)
*Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201, FC (refd)
*Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 103, HC (refd)
*Magendran a/l Mohan v PP* [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
*Manogaran Marimuthu v Sivaraj a/l Chandran* [2018] MLJU 1973; [2018] 1 LNS 2062, HC (refd)
*Modular Tropical Ventures (M) Sdn Bhd (in liquidation) v George Varughese (practising as advocate and solicitors under the name of Messrs George Varughese & Co) and another appeal* [2019] 7 MLJ 506; [2019] 9 CLJ 812, HC (refd)
*Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors* [2009] 3 MLJ 589; [2009] 3 CLJ 221, FC (refd)
*Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)
*Munusamy v PP* [1987] 1 MLJ 492, SC (refd)
*Plymouth Case, Latimer and Barratt v Bates* (1880) 3 O'M & H 107 (refd)
*PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 (refd)
*RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] MLJU 934, HC (refd)
*S Harcharn Singh v Sajjan Singh & Ors* [1985] AOR 236, SC (refd)
*Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
*Shanta a/p Manickam (suing for herself and her children being the dependants of the deceased Letchumanan a/l Subramaniam) v Teik Joo Chan Sdn Bhd & Anor* [2015] 11 MLJ 721; [2015] 8 CLJ 611, HC (refd)

A *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585, CA (refd)
*Wan Mohamad Hisham bin Wan Abdul Hamid v Che Alias bin Hamid Mohamed @ Hashim* [2023] MLJU 2228, HC (refd)
*Wan Sagar bin Wan Embong v Harun bin Taib & Ors* [2008] 4 MLJ 473; [2009] 1 CLJ 457, FC (refd)

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**Legislation referred to**

Election Offences Act 1954 ss 10, 10(a), (c), (e), 11, 32
Election Petition Rules 1954 r 4(1)(b)
Evidence Act 1950 ss 90A, 73A, 73A(1), (2), 114(g), 134
C Supply Enactment 2022

**Appeal from**: Election Petition No TA-26PP-1–01 of 2023 (High Court, Kuala Lumpur)

D *Wira Mohd Hafarizam Harun (with Abu Bakar Isa Ramat, Mohamed Baharudeen Mohamed Ariff, Norhazira Abu Haiyan and Muhammad Amin Othman) (Hafarizam Wan & Aisha Mubarak) for the appellant*
*Takiyuddin bin Hassan (with Wan Rohimi bin Wan Daud, Yusfarizal bin Yussof and Mohd Faizi bin Che Abu) (Faizi & Assoc) for the respondent.*

E

**Rhodzariah Bujang FCJ:**

**[1]** The appellant in this appeal before us had filed a petition in the High
F Court of Kuala Terengganu to nullify the election of the respondent as the representative for the Parliamentary constituency of Marang, Terengganu in the last General Election, PRU 15, held on 19 November 2022. After a full trial, the learned election judge dismissed the same with cost of RM50,000. Dissatisfied with that outcome, the appellant filed this appeal before us, which
G we heard on *15 November 2023* and with the end result, which disfavours the appellant as well, delivered orally by us at the conclusion of the said hearing after considering the written and oral submissions of both parties and perusing through the cause papers. Our reasons for deciding so would be enumerated herein below but to better appreciate our reasonings, we would first lay down
H some salient background facts respecting the parties and their dispute.

BACKGROUND FACTS

**[2]** The parties herein were two out of four candidates vying for the Marang
I seat. The appellant was a candidate from Barisan Nasional ('BN') whilst the respondent was from PAS (Parti Islam Se-Malaysia) and the other two were from PEJUANG and Pakatan Harapan ('PH'). It is necessary to now tabulate the number of votes garnered by each of the said candidates for a reason to be elucidated later in this judgment of ours:

| | Candidate | Party | No of Votes |
|---|---|---|---|
| i | Tan Sri Hj Abdul Hadi Awang | PAS | 73115 |
| ii | Jasmira bin Othman | BN | 31386 |
| iii | Dr Zarawi bin Sulong | PEJUANG | 427 |
| iv | Ustaz Azhar | PH | 4140 |

In his petition, the appellant contended that the respondent's victory was premised on bribery evidenced by the following two incidences:

(a) the giving of RM50 per registered voter by one Mohd Norddin bin Abd Jalil ('Norddin'), allegedly the respondent's agent at Surau Ar-Ridwan, Kampung Tok Hakim at Jalan Pelong, Padang Midin on *19 November 2022*, two of whom are Nor Shafiqa Azima bt Azam and Mohd Junaidi bin Embong;

(b) the giving of assistance by the respondent's agent, namely PW8 (YB Mohd Nor Hamzah), PW9 (YB Sulaiman Sulong) and PW10 (YB Ariffin Deraman) at an event conducted over a four days period, called Majlis Penyerahan Bantuan i-Belia and i-Siswa, on the 14 November 2022 till 18 November 2022. The details of the alleged bribery at the said functions are particularised as follows:

(i) one off payment of RM150 to a chosen recipient at Duyung Convention Centre on 14 November 2022;

(ii) one off payment of RM150 to each of the chosen recipient at Dewan Sivik Bukit Payung on 14 November 2022;

(iii) one off payment of RM150 to each chosen graduate at Dewan Terbuka Kampung Binjai Bongkok on 18 November 2022;

(iv) one off payment of RM150 to each of the chosen recipient at Dewan Tok Guru, Rusila on 16 November 2022;

(v) one off payment of RM150 to each of the chosen graduate at Dewan Besar IKBN Wakaf Tapai on 17 November 2022; and

(vi) one off payment of RM150 to each of the chosen graduate at Dewan Sivik Bukit Payung on 17 November 2022.

THE LAW

**[3]** There is a specific statutory prohibition against the giving of bribery before, during or after an election which when proved, nullifies the result of the said election namely, s 32 of the Election Offences Act 1954 ('the Act') which provides as follows:

A 32 *Avoidance of election on election petition*

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:

B (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in
C accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
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(d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or

E (e) that the candidate was at the time of his election a person disqualified for election. (Emphasis added.)

More particularly, s 10 of the Act makes the giving of bribery an offence and
F punishable under s 11, thereof, evidencing the clear abhorrence of the law against this illegal practice.

10 *Bribery*

The following persons shall be deemed guilty of the offence of bribery:

G (a) every person who, before, during or after an election, who directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or voter, or to or for any person on behalf of any elector or voter or
H to or for any other person, in order to induce any elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such elector or voter having voted or refrained from voting at any election;

I (b) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to vote

or refrain from voting, or corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting at any election;

(c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;

(d) every person who, either before, or during an election, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any elector or voter at an election;

(e) every person who, either before, or during an election, advances or pays or causes to be paid any money to, or to the use of, any other person with the intent that such money or any part thereof shall be expended in bribery at any election or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election;

(f) every elector or voter who, before or during any election directly or indirectly, by himself or by any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any such election;

(g) every person who, after any election, directly or indirectly, by himself or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting at any such election;

(h) every person who, after an election directly or indirectly, by himself or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any election, applies to such candidate, or to his agent or agents, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; and

(i) every person who, either before, or during an election, directly or indirectly, by himself or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if he has become a candidate, gives or procures any office, place or employment, or agrees to give or procure or offers or promises to procure or to endeavours to procure any office, place

or employment, to or for such other person, or gives or lends, or agrees to give or lend, or offers, or promises to procure or to endeavor to procure any money or valuable consideration to or for any person or to or for such other person, or to or for any person on behalf of such other person.

11 *Punishment and incapacities for corrupt practice*

(1) Every person who —

(a) Commits the offence of personation, or aids, abets, counsels or procures the commission of the offence of personation;

(b) Commits the offence of treating, undue influence or bribery;

(c) Prints, publishes, distributes or posts up or causes to be printed, published, distributed, or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer and publisher;

(d) Makes or publishes, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate;

(e) Makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate; any false statement of the withdrawal of any other candidate at such election; or

(f) Being a candidate or election agent knowingly makes the declaration as to election expenses required by section 23 falsely, shall be guilty of a corrupt practice, and shall, on conviction by a Session Court, be liable, in the case referred to in paragraphs (a) and (b), to imprisonment for a term not exceeding two years and to a fine of not less than one thousand ringgit and not more than five thousand ringgit, and, in any other case, to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit. Offences under paragraph (a) and (b) shall be seizable offences within the meaning of the Criminal Procedure Code.

(2) Every person who is convicted of a corrupt practice shall, subject to any specific provision to the contrary in any written law relating to any election, by conviction become incapable of being registered or listed as an elector or of voting at any election or of being elected by any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction:

Provided that such disability shall cease on the expiry of five years from such conviction.

(3) A prosecution for a corrupt practice except any corrupt practice as defined in paragraph (d) and (e) of subsection (1) shall not be instituted without the sanction of the Public Prosecutor.

(4) Within eight weeks from the publication of the results of the election, the Public Prosecutor shall prepare and submit a report to the Election Commission, the person or persons lodging the complaints of offences under this Act and all political parties, setting out the list and particulars of complaints of offences under this Act during the course of the election; stating particulars of the offences for which he has given consent for prosecution and setting out the reasons for those offences which he has not given such consent. (Emphasis added.)

It is trite law that given the seriousness of the above mentioned punishment, which is penal in nature, meted out to those guilty of election offences, an election petition is quasi-criminal in nature and the standard of proof in proving the allegations stated therein is beyond reasonable doubt, as had been lucidly stated in cases listed out in the learned election judge's grounds of judgment and the written submissions of both learned counsel in this appeal, such as that of this court in *Audrey Karen Barry v Datuk Dr Yee Moh Chai* [2009] 3 MLJ 141; [2010] 3 CLJ 660 and *Isnin bin Hj Aliasnih v Lajim bin Ukin* [2014] 5 MLJ 297; [2014] 6 CLJ 950. Both cases had also quoted the same excerpt reproduced in the judgment of Azizah Hj Nawawi J (as Her Ladyship then was) in *Manogaran Marimuthu v Sivaraj a/l Chandran* [2018] MLJU 1973; [2018] 1 LNS 2062 on the elements to be proven in order to discharge that high standard of proof when bribery is alleged, which we are equally moved to do, ie, reproduce, given the clear necessity of proving the said elements in this appeal and they are as follows:

[17] Therefore, under s 32(c) of Act 5 read with s 10, the petitioner is to prove the following elements:

(i) *that before, during or after an election, either*

(a) gives money to an elector or voter (s 10(a)); or

(b) by another person with the respondent's knowledge or consent.

(ii) *either*:

(a) gives money to an elector or voter (s 10(a));

(b) gives money to any person (s 10(c)); or

(c) advances, or pays or causes to be paid any money to any person (s 10(e))

(iii) *for the following purpose*:

(a) in order to induce the recipient of that money to vote or refrain from voting in the election (s 10(a));

(b) in order to induce the recipient of that money to procure or endeavor to procure the election of the Respondent (s 10(b)); or

(c) with the intent that such money or any part thereof shall be

A expended in bribery at any election (s 10(e)).

As noted by the fairly recent decision of this court in *Abdul Hakim bin Abdul Wahid v Mas Ermieyati bt Samsudin and another appeal* [2023] 4 MLJ 232; [2023] 6 CLJ 667, the statutory requirement of election law is mandatory in nature, which must be strictly observed because parties' rights in an election and the election dispute are governed by statute or special law which is unknown to common law or equity. This legal point was reiterated by appellant's counsel before us as well.

**[4]** In exercising our appellate jurisdiction, including in election petition cases, we always remind ourselves that we should be slow to disturb findings of facts made by the trial judge and the word of Jayantilal Chhotalal Shah CJ when delivering the judgment of the Supreme Court of India in the election case of *DP Mishra v Kamal Narain Sharma & Ors* 1971 AIR 856 provide a clear reminder of the same and we quote:

> 19. We have carefully considered the evidence and just circumstances, and we do not think that a case is made out justifying us in taking a view different from the view of the High Court. *The proceeding before us is quasi-criminal in character, and this court will not normally disagree with the view of the High Court, where the High Court has reached, on appreciation of evidence, the conclusion that the corrupt practice charged against a person is not proved. This court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this court may take on the evidence a different view. An appellate court is reluctant to disregard the conclusion on matters of appreciation of evidence by the court which had occasion to watch the demeanour of the witnesses examined before it, and to substitute its own view thereon. Where the proceeding triad by the court of first instance is of quasi-criminal nature, the reluctance of the appellate court is greater. The question is not one of power or authority of the appellate court, but of the respect and consideration due to the court of first instance and of the limit inherent in the exercise of the appellate functions*. (Emphasis added.)

**[5]** Further, the learned election judge has had the advantage over the appellate court judges in assessing the witness's demeanour. Groove J in *Borough of Wakefield* (1874) 2 O' M & H 100 had this to say on the credibility of evidence given by bribed persons:

> *It is perfectly true that where witnesses are called to prove that they themselves were bribers, their testimony is open to suspicion, varying in degree with the circumstances under which that testimony is given, and its effect upon the judge must depend a good deal upon the demeanour of the witnesses, and to such circumstances as many transpire to lead to any fair or well-founded opinion as to whether, although they are tainted with the necessary admission that they have been guilty of improper practices, they are so tainted that their evidence is to be disbelieved altogether, or whether what I may call circumstantial value of their evidence is such that they may be believed, although they do not come forward in a reputable character. There are no infallible rules to be laid down*

*upon such a matter as this, and very slight differences may turn the scale and influence the mind of the tribunal, as to whether the witness is to be believed or not. The answer to one or two questions, the mode of the answer, the observation as to whether there is anything evasive, or whether the witness fairly makes what is commonly called a clean breast of it is in an honest and straightforward way; all these are matters for consideration by the tribunal. Independently of this there are also the sources from which the evidence comes, as, for instance, supposing that three or four witness come from what may be considered a prejudiced source indicating something in the nature of a conspiracy, or that on the other hand they come from such a variety of different sources that it is not likely or would not be reasonable to presume that they had all been induced, without any apparent reason, or without any single predominating motive, to come and tell a series of falsehoods. All these circumstances and a vast number of others have to be looked at, some of them so delicate and difficult of appreciation that they hardly admit of being described in words as to their effect upon the mind of a judge who tries a case of this description*. (Emphasis added.)

## JUDGMENT OF THE LEARNED ELECTION JUDGE

In summary, His Lordship's findings are as follows:

(a) on the alleged bribery at the *surau*, the learned election judge rightly noted that since in his petition the appellant had pleaded specifically two named persons as recipients of the bribe, he was bound by his pleading and must call them to testify but the appellant did not do so. Instead the appellant called five alleged recipients, ie, PW2 to PW6 and their unpleaded evidence of receiving RM450 according to the learned election judge were unacceptable in law, citing *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 and more particularly this court's decision in *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201 which is specifically on the stringent requirement of pleading in an election petition case. The said failure of the appellant, according to the learned election judge was prejudicial to the respondent since he has the right to know the exact identity of the persons receiving the bribe and the amount received in order to prepare a precise and valid defence. In this regard, the learned election judge went on to reject the appellant's attempt to adduce a video recording of PW2 to PW6 receiving the alleged bribery from Norddin and his instruction to them to say 'Wallahi saya undi PAS' and their compliance with his instruction as aforesaid. That rejection was premised on the fact that the recorder of the video was not called as a witness and the non-production of a certificate under s 90A of the Evidence Act 1950 to verify that the video recorder was in good condition. His Lordship thus ruled that based on the infirmities above and the non-calling of the two named recipients, the real identity of Norddin was not proven beyond reasonable doubt, which burden rested on the appellant's shoulders, as per this court's decision in *Isnin*'s case.

Further, held His Lordship, the non-calling of Norddin attracts s 114(g) of the Evidence Act 1950 and, therefore, the appellant had failed to prove that Norddin was the respondent's agent and of the alleged bribery at the said *surau*;

(b) on the alleged bribery at the six graduate programmes, the learned election judge stated and correctly so, that these programmes had been approved by the Terengganu State Executive Council ('State Exco') and were therefore the State Government's official aids, that the renumerations were approved by the State Legislative Assembly on 15 November 2021, then by His Majesty, the Sultan of Terengganu on 27 January 2022 and *gazetted* on 24 February 2022. Therefore, His Lordship held that the giving of these aids cannot be the subject of corruption or bribery under the Act. With regards to the allegation of the appellant that PW8, PW9 and PW10 who were the Exco members and Deputy Exco of Terengganu State Assembly, respectively, were the respondent's agent, the learned election judge held, based on this court's decision in *Wan Sagar bin Wan Embong v Harun bin Taib & Ors* [2008] 4 MLJ 473; [2009] 1 CLJ 457 that the appellant had failed to prove 'the element of appointment' of an agent of the appellant which this court held must be pleaded and proved. On the other hand, His Lordship noted that, the direct evidence shows that they were not the respondent's agents as they officiated at the said events on invitations based on their official capacities as representatives of the State Government and the Chief Minister of Terengganu, which facts according to him are clearly distinguishable from *Manogaran*'s case given the clear evidence, inter alia, that the respondent had no knowledge of the said events. Despite making the aforesaid finding, the learned election judge went on to consider whether the giving of the said aids had influenced the voters and held that the recipients of the aids must be called to give evidence as only they could prove beyond reasonable doubt that the said aids influenced them to vote for the respondent or PAS. His Lordship also considered the fact that the total number of recipients of the aids were 6,286 whereas the respondent won by a majority of 48,377 votes and given that wide majority, the giving of the aids had no substantial effect on the outcome of the election. In His Lordship's view, even considering that the aids were given inside a green envelope containing photograph of the Exco members with or without their wives at the said function's where the backdrop has the party's logo with the respondent's photograph, as well as the putting up of the PAS flags and PW10's speech inviting the attendees to vote for the respondent, but to say that the said recipients were influenced by the said gifts are demeaning and an insult to the political awareness of the registered voters in Marang. With regards to the issue of whether the aids were given to canvass for the said voters because they were given at the last week of the campaigning period, the

learned election judge was of the view that because the aids were approved on 7 September 2022 in the Supply Enactment 2022 before Parliament was dissolved, there was no element of corruption involved and in view of the evidence which justified the delay in handling out the aids and why it could only be done on the said date. These reasonings we would elaborate further later in our judgment; and

(c) on the other hand, the learned election judge was convinced with the veracity of respondent's evidence that his only agent was one Mohd Nasir bin Ismail and not Norddin, nor PW8–PW10 and that he was never involved in the graduate programmes because they were the official ones of the State Government which he had no direct knowledge of.

THE APPEAL

*The surau bribery*

Before us, learned counsel for the appellant submitted that the learned election judge was wrong in his findings on this allegation because of the non-pleading issue because in para 6 of his petition, the appellant had pleaded that there were a number of bribes given and at para 6.1, thereof, he alleged that the bribery was given not just to Nor Shafiqa and Mohd Junaidi, so therefore, there was no surprise. Further a list of witnesses to be called by the appellant was filed in court before the trial and as provided by s 134 of the Evidence Act 1950, no particular number of witnesses is required to prove any fact in a case before the court. Granted that there is that clear leeway given by that statutory provision by statute and in this case, the general pleading of the appellant in para 6.1 as stated above, nevertheless, in our view the non-calling of the two specifically named recipients of the alleged bribes by the appellant was rightly held by the learned election judge to be detrimental to the respondent, as it is akin to a departure from his pleaded case and for which the calling of the other unpleaded alleged recipients namely PW2-PW6 could not mitigate. Further, as raised by learned counsel for the respondent in his written submission, the names of the said recipients are material facts which must be pleaded under r 4(1)(b) of the Election Petition Rules 1954 to enable the respondent to effectively prepare his defence to the petition, citing, inter alia, *Samuel Naik Siang Ting*'s case, *Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363; [2010] 8 CLJ 608 and *Ahmad Faisal bin Abdul Karim v Mohd Radzi bin Md Jidin* [2023] 9 MLJ 217; [2023] 4 CLJ 167. As held in *Mohd Zaid*'s case the first respondent in the said case, and likewise the respondent in our case here, is entitled to know with clarity and certainty at the very earliest stage the name and identity of the persons to whom the alleged act (of bribery) was made or addressed, citing, inter alia, *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors* [2009] 3 MLJ 589; [2009] 3 CLJ 221. It is to be noted as well that in *Ahmad Faisal*'s case, the need to plead the names of the recipients of the alleged bribery was specifically

A listed as one of the eight basic facts which must be pleaded by the petitioner in an election petition when his cause of action is premised on bribery.

REJECTION OF THE VIDEO EVIDENCE

B **[6]** Learned counsel for the appellant referred us in his written submission to the case of *RNS Oil and Gas Sdn Bhd v Norhayati binti Ahmad Kamal* [2016] MLJU 934 (HC) to submit that even though the said video of Norddin who was a member of the PAS Marang Branch Working Committee and holding various posts in the Marang Branch, ie, Head of the *Sidang Assabiqun*; C Financial and Assets Committee member, the Fifth Assistant of the Election Division, and Government, Private and NGO *Lajnah* member, was denied by the respondent as his agent and that video was only marked for identification (ie, ID14), the election judge has the discretion and power under s 73A(2) of the Evidence Act 1950 to consider its admissibility at the end of the trial. Here, D he submitted further the video clearly shows the said Norddin directing a few individuals to swear 'Wallahi, saya undi PAS' before giving the money to them and one of whom was Long bin Mohd Sulaiman (PW2) who gave evidence to say that he did as directed. Learned counsel also highlighted PW2's evidence that the individual in the video and that in the photograph marked as ID14 E and ID17 was the same person. However, with due respect to learned counsel for the appellant, what he failed to highlight is the proviso to s 73A which clearly qualifies the admission of such evidence (the video in this case) in the absence of the maker, which is reproduced below together with sub-s (1) only, being the relevant provision:

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> 73A(1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
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> G
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> (a) If the maker of the statement either —
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> (i) Had personal knowledge of the matters dealt with by the statement; or
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> H
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> (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
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> I
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> (b) *If the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to*

*find him have been made without success*. (Emphasis added.)

**[7]** In the absence of evidence justifying the non-applicability of the said proviso, it is trite law that evidence marked for identification cannot be relied on as evidence by the court as rightly submitted by learned counsel for the respondent, citing *Shanta a/p Manickam (suing for herself and her children being the dependants of the deceased Letchumanan a/l Subramaniam) v Teik Joo Chan Sdn Bhd & Anor* [2015] 11 MLJ 721; [2015] 8 CLJ 611, *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 and *Modular Tropical Ventures (M) Sdn Bhd (in liquidation) v George Varughese (practising as advocate and solicitors under the name of Messrs George Varughese & Co) and another appeal* [2019] 7 MLJ 506; [2019] 9 CLJ 812.

THE NON-CALLING OF NORDDIN AS A WITNESS

**[8]** Learned counsel for the appellant submitted that the non-calling of Norddin due to a futile attempt to subpoena him and the non-filling of the affidavit of non-service is not fatal to his client's case because the respondent in his own evidence admitted knowing him because Norddin was a member of PAS Marang's Branch Working Committee as well as various other position which we had mentioned earlier. Therefore, no adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against him as submitted by learned counsel for the appellant citing *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 and *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585. However, as considered by the learned election judge in para 39 of his grounds of judgment, Norddin indeed was an important and material witness for the appellant. Even if there should not be an invocation of the said adverse inference under s 114(g) against the appellant because the appellant's witnesses PW2–PW6 do not know him and given the non-calling of Nor Shafiqa Azima bt Azam and Mohd Junaidi bin Embong whom the appellant pleaded specifically in para 6.8(i) and (ii) of his petition as the recipients of the alleged bribery from Norddin, we are synonymous with the learned election judge's decision to reject the appellant's contention that he was the respondent's agent. As had been decided by this court in *Wan Sagar Wan Embong*'s case, the net of agency cannot be casted too wide to include even ordinary party supporters for there has to be a nexus or connection between the alleged agent and the respondent as the candidate. In other words, as held in *Jikulin Nointin @ Anastasius v Gapari bin Kitingan @ Geoffrey Kitingan & Ors* [2018] MLJU 1657; [2018] 1 LNS 1858, there is no presumption of implied agency in election law even though the alleged agents and the respondent are from the same party and in this case, even though Norddin was a committee member of PAS Marang constituency at that material time. It is opportune to note on this score that this court in *Isnin*'s case similarly rejected the allegation of bribery by the respondent's polling agent, one Norliah based

similarly on the appellants' failure in the said case to adduce sufficient evidence to establish her appointment as the respondent's agent and therefore found that her giving of the bribe was done on a frolic of her own. This puts to rest this issue on the alleged bribery at the *surau*.

BRIBERY AT THE I-SISWA AND I-BELIA AND SIX OTHER PROGRAMMES

**[9]** Learned counsel for the appellant referred us to two decisions of the election court in *Dato' Mohd Zubir bin Embong lwn Datuk Hj Ahmad Amzad bin Mohamed @ Hashim* [2023] MLJU 1542 and *Wan Mohamad Hisham bin Wan Abdul Hamid v Che Alias bin Hamid Mohamed @ Hashim* [2023] MLJU 2228 where these very same programmes, inter alia, form the grouses of the petitioners and the petition to nullify the victories of their respective respondents were allowed by the learned judges. We noted that there was no notice of appeal filed against these decisions.

**[10]** The giving of these aids during the campaign period is an undisputed fact. However, as rightly noted and considered by the learned election judge, which we had mentioned earlier and would again reiterate, the said aids were part of the budget approved by the Terengganu's State Legislature on 15 November 2021, endorsed by His Royal Highness the Sultan of Terengganu on 27 January 2022, and then *gazetted* on 24 February 2022 (Terengganu Enactment A75). A paper on the implementation of the programmes was earlier presented to and approved by the Terengganu's State Executive Council on 7 September 2022. However, considering that the applications for the aids had to be made online from 18 September 2022–7 October 2022, the process of verification of the approval was from 8 October 2022–17 October 2022 and the approval process was 18 October 2022–27 October 2022, the said programs could only be held from 30 October 2022–30 November 2022. Dissolution of Parliament was only made on 10 October 2022 and the Parliamentary General Election was held on 19 November 2022. Therefore, on the face of it, the giving of these aids was not pre-planned to induce voters to vote for the respondent, although undeniably the timing was just right for the respondent. These two aids were presented by three persons (called as witnesses by the appellant himself, ie, PW8, PW9 and PW10, PW8 (whom we had named earlier) during the last week of the campaign period till the day before the election itself. It must be emphasised that none of the recipients was called to give evidence. As noted by the learned election judge, PW8, PW9 and PW10 were either the Exco of the State or Deputy Exco. Learned counsel for the appellant submitted that since they were high ranking officers (*Pimpinan Tertinggi*) in PAS, they were interested witnesses whose evidence must be treated with extreme care and caution as held in *Goh Kooi Pheng v Public Prosecutor* [2016] 6 MLJevi 145 (CA) and *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 (FC). Granted, that this is so but

these witnesses were called by the appellant, who gave evidence contrary to his case and were never declared as hostile witnesses by the court. The learned election judge had rightly evaluated their evidence and came to a finding that they handed the aids not as agents of the respondent but by virtue of their official positions in the Terengganu State Exco. On this score, it is pertinent to refer to the case of *Plymouth Case, Latimer and Barratt v Bates* (1880) 3 O'M & H 107 cited by learned counsel for the appellant, where Mr Justice Lush at pp 109–110 of the reports states as follows:

> It is obvious that what are called charitable gifts may be nothing more than a specious and subtle form of bribery, a pretext adopted to veil the corrupt purpose of gaining or securing the votes of the recipients. And if this is found to be the object of the donor, it matters not under what pretext, in what form it may be, what person, or through whose hands the gift maybe bestowed, or whether it has proved successful in gaining the desired object or not.

However, learned counsel did not highlight the sentences that followed thereafter which we now reproduced below:

> *On the other hand, a gift may really be what is professes to be, the offspring of a purely benevolent impulse, and, if this be its character, it matters not whether the recipient makes a good or bad use of it, or what its effects may be upon him. A motive originally pure cannot become corrupt by reason of a misuse of what was intended to be a benefit.* (Emphasis added.)

**[11]** Thus, given the antecedent approval given by the State Executive Council to the giving of these aids which was, to quote Mr Justice Lush 'a purely benevolent impulse' to equate it to a bribery, given that background of the said aids, would not be right because it cannot be said to be beyond reasonable doubt that those aids were meant to bribe the recipients. By concluding so, we are not, as cautioned by Clement Skinner J in *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 103, citing *S Harcharn Singh v Sajjan Singh & Ors* [1985] AOR 236, stretching that burden to the point of impossibility. We wish to also stress that we are not in any way disagreeing with learned counsel for the appellant's submission that the sanctity of election is of public importance for it is so in every country subscribing to a democratic process and that the giving of bribes disguised as aids if proven to be so pending an election process would destroy that very sanctity. It is just that in the factual circumstances of this case, we decided in the respondent's favour because there was nothing sinister in the giving of the said aids. In the circumstances, we reiterate that we are in agreement with the findings of the learned election judge and in the upshot, the appeal against His Lordship's decision was dismissed but with no order as to costs.

A *Appeal dismissed.*

Reported by Ashok Kumar

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